Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1333

DONALD A. RADO,

Petitioner

v.

STATE OF CONNECTICUT, and JOHN R. MANSON, COMMISSIONER OF CORRECTIONS,

Respondents

MOTION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

The history of the proceedings is reported in the petition for certification, p. 9, and the respondent agrees with the petitioner's recital. Briefly, the petitioner was convicted of conspiracy, burglary, and robbery in the Superior Court of Connecticut in 1972. His conviction was affirmed by the Supreme Court of Connecticut in State v. Rado, 172 Conn. 74 (1976), cert. denied 430 U.S. 918 (1977).

The petitioner then addressed the United States District Court for the District of Connecticut for collateral relief. The Court (Blumenfeld,J.) granted relief on October 24, 1978. The State of Connecticut appealed to the United States Court of Appeals for the Second Circuit, which in turn reversed the ruling of the District Court. Rado v. State of Connecticut, 607 F.2d 572 (2d Cir. 1979). The petitioner has sought review of the Second Circuit's decision by this Court.

In the Federal Court proceedings, the petitioner has consistently pressed two grounds for relief: violation of the Confrontation Clause incorporated in the Sixth Amendment to the Constitution of the United States; see Douglas v. Alabama, 380 U.S. 415 (1965); and violation of the Fifth Amendment; see Namet v. United States, 373 U.S. 179 (1963). The State of Connecticut strenuously urges that neither provision of the Constitution was violated and, more particularly, that none of the criteria for the granting of certiorari have been satisfied.

The testimony which resulted in the conviction is not subject to serious dispute, although the emphasis accorded by the various

reviewing courts has differed. While the issue before this Court concerns primarily the testimony of one Fred Hall, a factual background of the entire trial may be useful.

The opinion of the Connecticut Supreme Court in State v. Rado, supra, contains a precis of the evidence. See petitioner's brief, pp. E-3 to E-4. In essence, Sean Donnelly, Wayne Epprecht, and Fred Hall, the witness in issue, met in the petitioner's home on July 2, 1972, and proposed the robbery of a jeweler's widow. The widow's home could be seen from the defendant's home. Rado suggested that jewelry and money could be found in the widow's home. Rado gave Epprecht a pistol and the witness Hall gave Donnelly another pistol. In addition to the pistols, Rado gave Donnelly a "walkie-talkie" with which Donnelly was supposed to report any problems. State v. Rado, supra, 74.

The witness Hall drove Donnelly and Epprecht to the widow's house. As the Connecticut Supreme Court stated, "[They] struck and bound Theresa Hyman and ransacked the house, taking a number of items of jewelry. When surprised by a neighbor, Donnelly and Epprecht fled, dropping Rado's walkie-talkie in their haste, were picked up by Hall in his car, and returned to Rado's home, where they changed their clothes and gave the pistols back to Rado. The ownership of the walkie-talkie dropped by Donnelly was traced to Rado and, during a search authorized by a warrant, the pistol used by Epprecht during the robbery was found in the Rado home." State v. Rado, supra, 76-77.

The primary sources of the details of the crime were Donnelly and Epprecht themselves. See Petitioner's Appendix A-3. Although both were subjected to lengthy cross-examination, they remained steadfast in their

testimony as to the perpetration and circumstances of the crime. (Pet. App. A-4) Epprecht, during the trial, admitted that he had previously perjured himself regarding previous contacts with the Waterbury, Connecticut area, but that admission had little or no impact on his testimony concerning the crime. (See Pet. App. A-4)

Further, an employee of Radio Shack, which sells electronic equipment in Waterbury, testified that the "walkie-talkie" dropped by Donnelly had the same serial numbers as that sold to a person identifying himself as "D. Rado, 47 Mildred Avenue, Waterbury, Connecticut," which was the defendant's address. (A-4 - A-5)

Given the amount of evidence produced against the petitioner, the testimony of Fred Hall was deemed by the Second Circuit to be neither "crucial" nor "devastating." (A-17) A transcript of Hall's testimony is appended to the petitioner's brief and also is quoted extensively in the opinion of the Second Circuit; (A-6 - A-13) very briefly, Hall freely testified that he was a friend and sometime employee of Rado. (A-6) He also testified that he knew Epprecht. (A-6)

When asked about his car, Hall began to become evasive and the court declared him a hostile witness. (A-6) After the state's attorney returned to the subject of Hall's relationship with Rado, Hall attempted to invoke the Fifth Amendment privilege against self-incrimination. Upon the court's direction to the witness to answer the question, Hall responded to the question. (A-7) When the state's attorney asked Hall whether he had ever taken Epprecht and Donnelly to Rado's house, Hall again sought to invoke the Fifth Amendment. The court excused the jury and explained to Hall that because he had pleaded

guilty to a conspiracy charge involving the same events on the eve of the petitioner's trial, he no longer had the privilege. (A-7) On the jury's return, Hall again refused to answer, but at the court's direction, Hall finally said that he had met with Epprecht and Donnelly at Rado's house on July 3, 1972. After again initially refusing to answer, Hall said that he was not sure whether he had seen a gun or a walkie-talkie at Rado's house at that time. (A-7)

Then the state's attorney asked whether the four had planned the robbery. Hall refused to answer; the court ordered Hall to answer. The court excused the jury and told Hall that further refusal to answer would result in a finding of contempt. The state's attorney said he would withdraw the question. (A-7 - A-8)

When the jury again returned, the state's attorney broached the subject of Hall's prior guilty plea. Apparently reading from a transcript of the proceedings during which the plea was taken, the state's attorney asked whether the witness recalled the recitation of the factual basis for the plea, to wit, the essence of the crime and its planning as noted above. The witness Hall said that he recalled the recitation and his own agreement, at the time, with the facts. When the state's attorney asked, in the petitioner's trial, if the recitation was true, the court again excused the jury, a bench conference was held, and the state's attorney withdrew the question. (A-8 - A-9) On the jury's return, the state's attorney again referred to the proceedings of Hall's guilty plea; Hall recalled admitting that, inter alia, Rado had participated in the planning of the crime. (A-10)

The state's attorney then asked a series of four questions directed at the essence of the crime. The witness refused to answer and the questions were withdrawn. (A-11 - A-12)

On cross-examination, Hall was asked about a possible recommendation for leniency in return for his testimony. He again attempted to invoke his privilege, but when ordered to answer by the court, he stated that his attorney had been offered a "deal", the specifics of which he could not remember. Hall testified as to some of the occurrences on July 3,1972, but not about the crime. Hall tried to assert a privilege when asked if he had been to a Radio Shack store in Waterbury, and Rado's attorney withdrew the question. (A-12 - A-13)

An evidentiary hearing in the United States District Court revealed that prior to the commencement of Rado's trial, Hall agreed to plead guilty to a conspiracy charge in return for nolles on substantive charges of burglary and robbery and a recommendation of a sentence of two to four years, with the possibility of a lower recommendation if Hall cooperated. The state's attorney apparently also agreed not to contest Hall's right to assert a privilege against self-incrimination, but it was agreed that either side could subpoena Hall. The same judge who presided at Rado's trial accepted the plea and was aware of the terms of the agreement, except for the Fifth Amendment privilege arrangement. The court noted that if it were unable to agree to impose the recommended sentence, it would allow Hall to withdraw his plea. The guilty plea was entered and the representations and responses noted above were made. The state's attorney, then, didn't know prior to calling Hall as a witness in Rado's trial whether he would attempt to invoke a privilege. (A-5 - A-6)

II. REASONS FOR DENYING CERTIORARI

A. Douglas v. Alabama, 380 U.S. 415 (1965), was not violated in this case. In Douglas, the witness had supposedly supplied a signed confession, but the witness refused to answer any questions, even to acknowledge he made the statement. The prosecutor had asked a series of questions that were not answered and which implicated Douglas. This Court ruled that the right of confrontation was violated, because the prosecutor, who apparently had read from the statement, could not be cross-examined, and the witness could not be cross-examined because he did not even admit making the statement.

The Second Circuit distinguished Douglas on three grounds: that the testimony was neither "crucial" nor "devastating"; that Hall was available for cross-examination, in that Hall did respond when so ordered and admitted making the statements attributed to him; and that the statements bore strong indicia of reliability, as they were made in the context of a guilty plea and were corroborated by independent direct testimony. This case, then, is far more comparable to California v. Green, 399 U.S. 149 (1970), than to Douglas. See also Dutton v. Evans, 400 U.S. 74 (1970). It is urged that the considerations underlying Douglas are simply not applicable to this case; the witness here clearly could have been cross-examined about the statements.

The petitioner also argues that the opinion conflicts with those of other circuits. The respondent disagrees; the principles of law applied by the Second Circuit are consonant with those applied by other circuits. In Robbins v. Small, 371 F.2d 793 (1st Cir. 1967), relied upon by the petitioner,

a witness had purportedly made a statement, but, when he took the stand, he repeatedly invoked his privilege against self-incrimination; he did not admit making the statement. As the state had attempted to bolster an uncertain case by introducing the substance of a statement not in evidence and not subject to cross-examination; one cannot be cross-examined on the truth of a statement he has not admitted making. Thus the facts of Robbins parallel those of Douglas rather than those of Green and Dutton. There simply is no conflict with this case.

Other circuits have, in fact, expressed the same reasoning as the Second Circuit. See, e.g., United States ex rel. Thomas v. Cuyler, 548 F.2d 461 (3rd Cir. 1977); United States v. Payne, 492 F.2d 449 (4th Cir. 1974); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976); United States v. Rogers, 540 F.2d 490 (8th Cir. 1976). It is suggested that there is not substantial disagreement among the Circuits.

B. Namet v. United States, 373 U.S. 179 (1963), similarly was not violated. Under Namet, prosecutorial misconduct may occur when a case is attempted to be proved by consciously and flagrantly encouraging the drawing of inferences arising from the privilege, or, on occasion, when inferences from a witness' refusal to answer add critical weight in a form not subject to cross-examination. The Second Circuit, while recognizing the principles of Namet, held that they did not compel a new trial in this case because the prosecutor had no prior knowledge that the witness would attempt to invoke the privilege; the state's attorney, in a belief shared by the trial court, thought that the witness was not entitled to the privilege in this case; and, in the context

of the trial as a whole, whatever inferences may have been drawn did not add critical weight to the state's case. See also United States v. Mandujano, 425 U.S. 564 (1976). There appears to be no conflict between this opinion and Namet.

There similarly exists no legal disparity among the Circuit Courts. The cases cited by the petitioner, such as Robbins v. Small, supra; United States v. Mayes, 512 F.2d 637, 649 (6th Cir. 1975), cert. denied, 422 U.S. 108 (1975); United States v. King, 461 F.2d 53 (8th Cir. 1972); and United States v. Coppola, 479 F.2d 1153 (10th Cir. 1973); simply apply the same principles to varying factual situations. See also Trigg v. United States, 430 F.2d 372 (7th Cir. 1970).

It is suggested that this Court has dealt with problems arising under the Confrontation Clause from Douglas and Namet to Parker v. Randolph, _____ U.S. _____, 99 S.Ct. 2132 (1979). While the enunciated principles may on occasion be difficult to apply to a particular factual pattern, the principles themselves are quite clear. It is suggested that this case, where a witness admitted making the statement and was available for cross-examination, and where he answered questions when ordered to do so by the court, has been decided in a way consistent with this Court's decisions and no useful purpose would be served by the granting of certiorari.

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PROOF OF SERVICE

This is to certify that on May 23, 1980, a copy of the foregoing was mailed to David S. Golub, Esquire, P.O. Box 3247, Stamford, Connecticut 06905.

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